



Acquiring and Profiting from Distressed Real Estate Loans

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The Harvard Club of New York



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*Marguerite Brogan, Managing Director,
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- Distressed debt market overview
 - What has happened in the past?
 - What is different this time?
 - What lies ahead?



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Gary Eisenberg, Partner, Herrick, Feinstein LLP

- Due diligence concerns for defaulted loan purchases
- Defending against the wild borrower
- Negotiating the distressed loan purchase agreement



Due diligence concerns for defaulted loan purchases

- Is there a default?
 - How material is it?
 - Can the lender accelerate?
- What does the borrower owe?
- Where is the money?
- What is the collateral?
 - Does the borrower own the collateral it has liened?



Due diligence concerns for defaulted loan purchases (cont.)

- What is a PNA?
- How can the lender foreclose?
- How does the lender protect itself before it forecloses?
- What if the collateral is unusual?



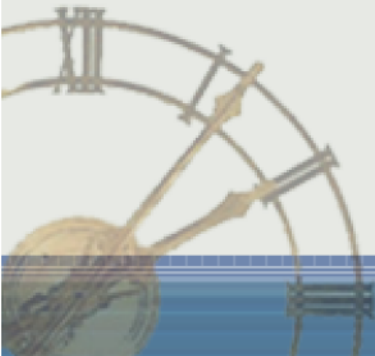
Defending against the wild borrower

- Who is suing whom, and for what?
- What records exist?
 - How can the purchaser access more of them?
- Have any of the loan documents been modified?



Negotiating the distressed loan purchase agreement

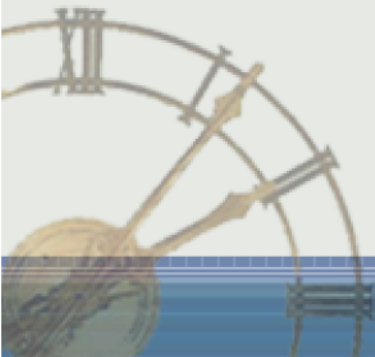
- Representations and warranties
- Loan documents to be delivered
- Enforcing the loan pending closing
- Sale versus assignment
- Buyer protection and seller flexibility prior to drafting of loan sale agreement
- Provisions regarding existing litigation
- Sale agreement exhibits; what must be recorded



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- Inter-creditor issues
- Anticipating bankruptcy scenarios
- The borrower is in bankruptcy, now what?



Inter-creditor issues

- Can one lender in a syndicated loan enforce the agreement after default?
- What if most of the lenders in the syndicate want to forbear?
- Is the administrative agent liable for following the will of the majority?
- Is a junior lender's assignment of its right to vote on a plan of reorganization enforceable?



Anticipating bankruptcy scenarios

- The impact of “springing guarantees”:
 - They are untested in bankruptcy court, and
 - May produce additional litigation.
- Can a mezzanine lender force dismissal of a property owner’s bankruptcy case?



The borrower is in bankruptcy, now what?

- Prepayment Premiums

Suggested analysis:

1. Has the prepayment premium been triggered according to the terms of the applicable agreement?
2. Is the prepayment provision enforceable under applicable state law?
3. If the prepayment premium is triggered post-bankruptcy, the court will test the prepayment premium for reasonableness under the Bankruptcy Code.



The borrower is in bankruptcy, now what? (cont.)

- Default interest
 - Purpose
 - Three approaches adopted by courts





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